

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

JANET L. OSBORNE, M.D., FACOG, FACS,

Plaintiff,

v.

Civil Action No. 7:12cv99

BED BATH & BEYOND, INC. and
LOSOREA PACKAGING, INC.

Defendants.

MOTION FOR LEAVE TO FILE THIRD-PARTY COMPLAINT

Bed Bath & Beyond, Inc. ("BBB"), by counsel and pursuant to Rule 14(a)(1) of the *Federal Rules of Civil Procedure*, requests leave to file a Third-Party Complaint against NHG Liquidation, Inc. f/k/a NAPA Home & Garden, Inc. ("NAPA") and Fuel Barons, Inc. ("Fuel Barons"), stating the following grounds:

1. Rule 14(a) of the *Federal Rules of Civil Procedure* allows a defendant to add a non-party who is or may be liable to the defendant for all or part of the plaintiff's claim at any time with leave of Court. This Rule should be liberally construed and leave freely given when justice so requires.¹

2. Janet L. Osborne (the "Plaintiff") filed this product liability action seeking general, compensatory and punitive damages from BBB for burn injuries she sustained on June 3, 2011, while using "FIREGEL" and "firepot" products at her Roanoke, Virginia home. In her

¹ See *Weaver v. Marcus*, 165 F.2d 862 (4th Cir. 1948), rev'd 73 F.Supp. 736 (W.D. Va. 1947).

lawsuit, the Plaintiff alleges the "FIREGEL" and "firepot" products were defective, unsafe, unreasonably dangerous and negligently designed, labeled and manufactured.²

3. The Plaintiff's Complaint further alleges that Fuel Barons and NAPA created or manufactured the "FIREGEL" and "firepot" products.³

4. The "FIREGEL" and "firepot" products described in the Plaintiff's Complaint were manufactured by Fuel Barons and distributed by NAPA.

5. BBB contracted with NAPA to design, manufacture, package, label, distribute and supply for retail sale certain products and merchandise to BBB, including the type of "FIREGEL" and "firepot" products that are the subject of the Plaintiff's Complaint. BBB acquired these products from NAPA.

6. BBB denies that it is liable to the Plaintiff for the allegations stated in the Complaint, but asserts that if it is held liable to the Plaintiff, BBB is entitled to indemnification and/or contribution from Fuel Barons and NAPA based upon their negligent acts and/or omissions proximately causing the damages and injuries alleged in the Plaintiff's Complaint.

7. BBB further asserts that if held liable to the Plaintiff, it is entitled to indemnification and/or contribution under the terms of its written contract requiring NAPA to fully indemnify BBB for any claims related to the "FIREGEL" and "firepot" products, including the claims asserted in the Plaintiff's Complaint.

8. BBB further asserts that if held liable to the Plaintiff, it is entitled to indemnification and/or contribution from NAPA and Fuel Barons based upon their breaches of (a) express warranties, (b) implied warranties of merchantability, and (c) the warranty of fitness

² Complaint, paragraphs 36 through 57.

³ Complaint, paragraphs 6, 7 and 10.

{W1990886.1 }

for the particular purpose for which the "FIREGEL" and "firepot" products were designed and distributed.

9. On January 24, 2012, Fuel Barons filed a voluntary petition in the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division ("USBC"), under Chapter 11 of the United States Bankruptcy Code (Case No. 12-51650).

10. On June 22, 2012, the USBC granted BBB's motion for relief from the automatic bankruptcy stay and authorized BBB to file a third-party claim in this lawsuit against Fuel Barons.⁴

11. On July 5, 2011, NAPA filed a petition in the USBC seeking relief under Chapter 11 of the United States Bankruptcy Code (Case No. 11-69828).

12. On May 30, 2012, the USBC granted BBB's limited motion for relief from the automatic bankruptcy stay and authorized BBB to file a third-party claim against NAPA in this lawsuit.⁵

13. BBB requests that the Court grant BBB leave to file and serve the Third-Party Complaint attached as Exhibit C naming NAPA and Fuel Barons as third-party defendants in this action so that BBB may proceed against the third-party defendants in this lawsuit in accordance with the authorizations granted by the USBC.

14. BBB has not acted with unreasonable delay, bad faith or an improper motive in requesting leave to assert this Third-Party Complaint under Rule 14(a) of the *Federal Rules of Civil Procedure*. Additionally, adding NAPA and Fuel Barons as third-party defendants will not alter the Court's diversity jurisdiction under 28 U.S.C. § 1332.

⁴ A copy of the bankruptcy Order authorizing the third-party claim against Fuel Barons and modifying the bankruptcy stay is attached as Exhibit A.

⁵ A copy of the bankruptcy Order authorizing the third-party claim against NAPA and modifying the bankruptcy stay is attached as Exhibit B.

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15. Local Rule 11(c)(2) provides that BBB's motion to add additional parties under Rule 14(a)(1) does not require a supporting brief, and this motion otherwise contains facts and legal arguments necessary to address BBB's request.

WHEREFORE, Bed Bath & Beyond, Inc. requests that the Court enter an Order granting its motion to file the proposed Third-Party Complaint against NHG Liquidation, Inc. f/k/a NAPA Home & Garden, Inc. and Fuel Barons, Inc.

BED BATH & BEYOND, INC.

By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Leave to File Third-Party Complaint was filed electronically with the Court and mailed first class, postage pre-paid, on the 9th day of July, 2012, to the following counsel of record:

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